

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

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GORDON MACRAE,

DOCKET No.: 1:14-cv-45-JL

PETITIONER

— AGAINST —

RICHARD M. GERRY, WARDEN,  
NEW HAMPSHIRE STATE PRISON

RESPONDENT

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CORRECTION TO RESPONDENT'S  
REPLY CONCERNING ITS MOTION TO DISMISS  
PETITION AS UNTIMELY

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Dated: September 25, 2014

On July 30, 2014, respondent state filed a motion to dismiss MacRae's petition as untimely. On August 21, 2014, MacRae filed a response to that motion. The state replied on September 8, 2014. The state's reply contains a misstatement of significant fact that requires correction – which is understandable, since the state's current counsel was not involved in the state court proceedings.

In its reply, the state alleges: “the parties agreed that no hearing on the newly discovered evidence claim was required,” “[MacRae] elected not to present his evidence at a hearing,” “[MacRae] was afforded the opportunity for a hearing, which he waived,” and that “[MacRae] waived his hearing. (State reply, p. 5-6) Accordingly, the state argues, this Court should not grant its own hearing to consider the newly discovered evidence. (*Id.*)

The state bases its argument on a sentence in the state superior court's decision: “[a]t a status conference on April 29, 2013, the parties agreed that the court could decide the remaining issue, whether newly discovered evidence supports the petitioner's request for a new trial, without a hearing.” (State Reply, p. 5) The state's reliance on that sentence is mistaken. MacRae agreed that oral argument was not necessary for the court to decide the remaining issue. MacRae did not also waive an evidentiary hearing. In fact, in state court, MacRae concluded his reply to the state's motion to dismiss with the statement:

the state has offered nothing that might undermine the need for a hearing in this case to further explore the weight of the evidence and address whatever disputes of fact the state might have created in its [motion to dismiss].

(Reply to State's Motion for Denial and Dismissal of Petition (12/7/12), p. 10)

Thus, the state's assertion that MacRae waived the opportunity to present his newly discovered evidence witnesses at a hearing is wrong. Granting the state's motion to dismiss based at all on that assertion would be incorrect, as well.

For all those reasons, and all of the reasons presented in MacRae's habeas corpus petition, memorandum in support, and all papers filed in this matter, MacRae respectfully requests that the state's motion to dismiss be denied in its entirety.

Respectfully submitted by his attorneys,

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